

June 6, 2005

Peter N. Brown, City Attorney  
City of Carpinteria  
Office of the City Attorney  
Hatch and Parent  
21 East Carrillo Street  
Post Office Drawer 720  
Santa Barbara, CA 93102

**Re: Your Request for Informal Assistance**  
**Our File No. I-05-017**

Dear Mr. Brown:

This letter is in response to your request on behalf of Councilmember Joe Armendariz for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Since your request does not identify a specific decision or proceeding and seeks our general guidance, we are treating your request as one for informal assistance.<sup>2</sup> Our informal assistance is based on the facts you provide. The Fair Political Practices Commission ("Commission") does not act as a finder of fact when it provides informal assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

### QUESTIONS

1. May Councilmember Armendariz participate in future decisions where the Santa Barbara Industrial Association or Santa Barbara County Taxpayer's Association appears before the city council to advocate a certain position on a matter before the council, yet neither SBIA, SBCTA nor any of their members are the applicant or the subject of the matter before the council?
2. May Councilmember Amendariz participate in future decisions where SBIA or SBCTA appears before the city council to advocate a certain position on behalf of a

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<sup>1</sup> Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (§ 83114; reg. 18329, subd. (c)(3), copy enclosed.)

member of that organization, when the member is the applicant or subject of the matter before the council? Does the analysis change if SBIA or SBCTA does not appear?

3. May Councilmember Amendariz participate in future decisions where a member of SBIA's or SBCTA's board of directors, or that director's employer, is the applicant or subject of the matter before the council?

4. Does the answer to any of the above questions change if the Santa Barbara County Association of Governments, the City of Carpinteria/Carpinteria-Summerland Fire Protection District Committee, or the City of Carpinteria/Carpinteria Unified School District Committee – on which the council member sits – is the decision-making body rather than the Carpinteria City Council?

### **CONCLUSIONS**

1. Except as discussed below, the individual members of the two groups are not sources of income to Mr. Armendariz and therefore, are not potential sources of a conflict. With respect to the SBIA or SBCTA, Mr. Armendariz may participate in governmental decisions so long as those decisions do not have a material financial effect on those entities. Where those entities are indirectly involved in such decisions, as your questions suggest, the answer will depend on the particular decisions in question.

2. Mr. Armendariz generally may participate in decisions where SBIA or SBCTA appear before the council in an advocacy role on behalf of its members, so long as the decision at issue will not also have a material financial effect on the two groups, independent of the impact on the individual members of SBIA and SBCTA.

3. We have no information to suggest that the persons described in this question are sources of income to Mr. Armendariz. Except as noted below in the context of whether individual members of these two groups are sources of income to Mr. Armendariz, we have no information to determine whether a particular director's employer is a source of income to Mr. Armendariz or otherwise an economic interest of Mr. Armendariz's.

4. We do not have enough information to determine whether these committees possess sufficient decisionmaking authority to subject them to the conflict-of-interest provisions of the Act. We have enclosed a copy of a regulation for you to consult in evaluating whether these or any other boards or committees may be subject to the conflict-of-interest provisions. On the other hand, if the council member is prohibited from voting as a council member, he also may not participate in discussions or make recommendations to the city council as a member of a city council subcommittee in order to influence the city council's decision.

## FACTS

Councilmember Armendariz is employed as the executive director/secretary of the Santa Barbara Industrial Association (“SBIA”). SBIA is a nonprofit, tax-exempt business advocacy group incorporated under Internal Revenue Service Code section 501(c)(6). SBIA members include a number of area businesses. Mr. Armendariz’s salary is paid out of SBIA’s annual membership dues. Each SBIA member is assessed annual dues based on the member’s current number of employees. SBIA is governed by a board of directors composed of representatives of entities that are members of SBIA. Mr. Armendariz is not considered an employee of SBIA and therefore completes a Form 1099, has no payroll taxes withheld, and does not receive any employment benefits from SBIA.

Councilmember Armendariz is also the executive director of the Santa Barbara County Taxpayers’ Association (“SBCTA”). SBCTA is a nonprofit, tax-exempt advocacy group incorporated under Internal Revenue Service Code section 501(c)(4). SBCTA members also include a number of area businesses. Councilmember Armendariz’s salary is paid out of SBCTA’s annual membership dues. As with SBIA, SBCTA’s membership dues are based on the member’s current number of employees. SBCTA is governed by a board of directors composed of representatives of entities that are members of SBCTA. Councilmember Armendariz is not considered an employee of SBCTA and therefore completes a Form 1099, has no payroll taxes withheld, and does not receive any employment benefits from SBCTA.

Prior to his election to the Carpinteria City Council, Mr. Armendariz appeared on occasion before the Carpinteria Planning Commission and City Council on behalf of SBCTA and/or SBIA.

As a council member, Mr Armendariz has been elected by the city council to serve on several regional or joint agencies and committees. These agencies and committees fall into two (2) categories:

- (1) Santa Barbara County Association of Governments (“SBCAG”), which is a regional planning agency composed of the members of Santa Barbara County Board of Supervisors and representatives of all eight (8) cities in the county. SBCAG distributes local, state and federal transportation funds and acts as a forum for addressing regional and multi-jurisdictional issues. SBCAG also serves as the Santa Barbara County Airport Land Use Commission (“ALUC”). SBCAG adopts a regional growth forecast and assists in compilation of census data, which is used in local agency general plans. SBCAG also distributes housing unit allocations pursuant to the Department of Housing and Community Development’s Regional Housing Needs Assessment process (“RHNA”) for inclusion in local agencies’ housing elements.
- (2) Cooperative working groups and committees in which more than one local agency is represented but whose decisions may be recommendations to, but do

not bind, local agencies. Mr. Armendariz is currently assigned to sit on the Carpinteria City Council/Carpinteria-Summerland Fire Prevention District Board Committee; City Council/Carpinteria Unified School District Board Committee.

In the future, a member of SBIA or SBCTA may be an applicant or may be the subject of a matter before the Carpinteria City Council. A representative from SBIA or SBCTA may appear before the council in support of a member's position or to testify regarding the city's policy issues. Similarly, SBIA, SBCTA or their members; (a) may appear before SBCAG either regarding project approval or project permit compliance or advocating positions that may be beneficial to their interests, or (b) may appear before cooperative working committees on which Mr. Armendariz sits.

### ANALYSIS

Because your questions are general in nature and do not describe any governmental decisions with particularity, we provide the following general guidance on the elements to consider when examining Mr. Armendariz's actions in the future. Your questions primarily concern the universe of individuals and entities that may comprise someone's economic interests. To that end, the following analysis focuses on that particular step in the eight-step analysis described more fully below.

Section 87100 prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict of interest (regulation 18700, subdivisions (b)(1) - (8)). The general rule, however, is that a conflict of interest may occur whenever a public official makes, participates in making, or influences a governmental decision which may materially affect one or more of his or her economic interests.

#### **1. & 2. Is Councilmember Armendariz a public official making, participating in making, or influencing a governmental decision?**

The conflict-of-interest prohibition applies only to public officials. As an elected member of the city council, Mr. Armendariz is a public official. (§ 82048; reg. 18701(a).) As a member of the city council and SBCAG, unless disqualified under the conflict-of-interest provisions of the Act, Mr. Armendariz will make, participate in making, and influence governmental decisions, including the decisions described in your request. (§ 87100; regs. 18702.1 – 18702.3.)

With respect to the cooperative working groups and committees, you indicate that those groups make recommendations to, but do not bind, local agencies. Without more information specific to a given committee, its history of recommendations and how those recommendations have been received by the respective local agencies to whom they report, we are unable to say whether the individual members of these groups are public officials by virtue of their membership. The Commission has adopted a regulation, copy

enclosed, to determine when the member of an otherwise 'advisory' board or committee is a public official. However, whether or not the group's or committee's other members are public officials does not change the council member's status as an existing public official.

Therefore, if the council member is prohibited from voting as a council member, he also may not participate in discussions, make recommendations to the city council, or otherwise influence the city council's decision by virtue of activities on boards or committees. This prohibition would extend to any attempts by the council member to influence his agency employees or use his position to influence the committee or board members. (*Burnham* Advice Letter, No. A-92-165; *Furth* Advice Letter, No. I-87-079; *see* regs. 18702.2, 18702.3.)

### **3. What are the council member's economic interests?**

The Act's conflict-of-interest provisions apply only to conflicts of interest arising from economic interests. These economic interests are described in regulations 18703.1 through 18703.5, inclusive. The specific economic interest identified by the facts you supply is Mr. Armendariz's interests in SBIA and SBCTA, and potentially one or more of its members, as sources of income to the council member. (§ 87103; regs. 18703.1 and 18703.3).<sup>3</sup>

#### *The SBIA and SBCTA:*

A public official has an economic interest in any source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision at issue. (§ 87103(c); reg. 18703.3.) The income paid to Mr. Armendariz for his duties as the SBIA's executive director/secretary and SBCTA's executive director, assuming it exceeds the \$500 threshold under the statute, means those entities are sources of income to Mr. Armendariz and numbers among his economic interests.<sup>4</sup>

#### *Individual SBIA and SBCTA Members:*

In certain instances, when the relationship between a public official and his or her employer is controlled by one, or a few, individuals who also effectively control the decisions of that entity, we have advised that these individuals are considered to be sources of income and an economic interest to the official. For example, in the

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<sup>3</sup> In addition to the economic interests separately listed in section 87103, a public official always has an economic interest in his or her personal finances, and may have a conflict of interest in any decision foreseeably resulting in an increase or decrease in the personal expenses, income, assets or liabilities of the official and his or her immediate family, in the amount of \$250 or more over a 12-month period. (Regs. 18703.5 and 18705.5.)

<sup>4</sup> You inquire only about possible conflicts of interest arising due to Councilmember Armendariz's employment as Executive Director/Secretary of the SBIA and Executive Director of SBCTA. Thus, our response is limited to this context and does not consider possible conflicts of interest arising from other economic interests he may have.

*Hentschke* Advice Letter, No. A-80-069, a Carlsbad planning commissioner who was employed by a closely held corporation was confronted with a decision that would not affect the corporation, but would substantially affect the president/majority shareholder of the corporation. In that instance we advised:

“In keeping with the purposes of the Act, we conclude that in this case the president/majority shareholder of the corporation for which Mr. Larson works may also be considered a source of income to Mr. Larson. Although for other purposes the corporation would be considered Mr. Larson’s source of income, there can be no question that in a closely-held corporation situation such as here the president/majority shareholder of a corporation effectively controls the employment relationship itself. Accordingly, we conclude that the majority shareholder is a source of income to Mr. Larson and that he should therefore disqualify himself from any decision which would have a material financial effect on the shareholder.”

However, as we previously advised in the *Lucas* Advice Letter, No. A-96-248, members of a nonprofit organization are not considered to be sources of income to an official unless one, or a few, of the nonprofit organization’s members financially affected by the governmental decisions actually control the organization’s decisions. Thus, so long as the decisions of SBIA and SBCTA, including decisions regarding Mr. Armendariz’s employment with these entities, are not controlled by a single or few of the organizations’ members, the individual members of these groups are not sources of income to the council member.

Thus, the council member will not have a conflict of interest prohibiting him from participating in decisions having a financial effect on the individual members of the two entities, unless the decisions also will have a reasonably foreseeable material financial effect upon SBIA and SBCTA or any other economic interests which the council member might have. For the remainder of this letter, we discuss only potential effects on SBIA and SBCTA.

#### **4. Will an economic interest be directly or indirectly involved in the decision?**

A person, including as a source of income, in whom a public official has an economic interest is directly involved in a governmental decision if that person, either directly or by an agent, initiates the proceeding by filing an application, claim, appeal, or similar request, or is a named party in, or is the subject of the proceeding concerning the decision before the official or the official’s agency. (Reg. 18704.1, subs. (a)(1) - (a)(2).) A person is the subject of a proceeding concerning the decision before the agency if the “decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with,” that person. (Reg. 18704.1, subd. (a)(2).) If a person who is an economic interest to a public official is not directly involved in a governmental decision, the person is deemed to be indirectly involved. (Reg. 18704.1, subd. (b).)

A person, such as an individual member or the associations, could appear before the official's agency in a representative capacity rather than being a named party. When acting in a representative capacity, we have advised that a person is indirectly involved in the governmental decisions concerning that matter. (*Orlik* Advice Letter, No. I-98-175; *Doyle* Advice Letter, No. A-97-071; *Nelson* Advice Letter, No. I-91-443.)

**5. Will the reasonably foreseeable financial effect of the governmental decision upon Councilmember Armendariz's economic interest be material?**

The SBIA and SBCTA are sources of income to Mr. Armendariz by virtue of his salary as the executive director of these two groups. Therefore, any reasonably foreseeable financial effect at all, even one penny, on these entities when they are directly involved in a decision before Mr. Armendariz's 'agency'<sup>5</sup> is deemed material. (Reg. 18705.3, subd. (a).)

When the source of income is an entity and is indirectly involved in the governmental decision, the impact on an entity deemed material varies in proportion to the size of the entity in question. For instance, assuming the SBIA and SBCTA are nonprofit organizations with annual income of less than \$100,000, the materiality standard applicable to the governmental decisions which Councilmember Armendariz may make, participate in making, or influence, when the SBIA or SBCTA are indirectly involved in those decisions, is found at regulation 18705.3, subd. (b)(2)(F):<sup>6</sup>

“(F) For an entity whose gross annual receipts are \$100,000 or less, the effect of the decision will be [material if] any of the following [apply]:

- (i) The decision will result in an increase or decrease of the entity's gross annual receipts for a fiscal year in the amount of \$10,000 or more.
- (ii) The decision will cause the entity to incur or avoid additional expenses or to reduce or eliminate existing expenses for a fiscal year in the amount of \$2,500 or more.
- (iii) The decision will result in an increase or decrease in the value of the entity's assets or liabilities in the amount of \$10,000 or more.”

*Nexus Test*

Notwithstanding the two materiality standards above, a separate standard can also define when a public official's governmental decisions will have a reasonably foreseeable material financial effect upon a source of income that is one of his or her economic interests. This is the “nexus test” set out at regulation 18705.3, subd. (c):

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<sup>5</sup> The mayor is a voting member of the Carpinteria City Council. Thus, for this purpose “agency” means the Carpinteria City Council.

<sup>6</sup> For entities of a different size, please refer to regulation 18705.3, subdivision (b)(2), enclosed.

“(c) Nexus. Any reasonably foreseeable financial effect on a person who is a source of income to a public official is deemed material if the public official receives or is promised the income to achieve a goal or purpose which would be achieved, defeated, aided, or hindered by the decision.”

The rationale for the nexus test is that when an employee earns a salary that is advanced by what he or she does as a public official, we presume that the employer is benefiting from the situation. (*Yarnell* Advice Letter, No. A-00-161.)

Typically, the test is applied in situations where the official is also a high-level employee with direct influence and control over his or her employer’s management or policy decisions. (*Low* Advice Letter, No. A-99-304.) The nexus test does not ordinarily apply to mid-level employees who are not involved in their employer’s policy decisions. (*Bosso* Advice Letter, No. A-00-064.) Here, Councilmember Armendariz is a high-level actor in SBIA and SBCTA, whose job responsibilities explicitly involve him in the groups’ policy decisions. Thus, a nexus exists, and a material financial effect may occur, if a particular governmental decision he is asked to participate in as a council member would also achieve, defeat, aid or hinder a policy, purpose, or goal of either of these groups. (*Nack* Advice Letter, No. A-01-121; *Lucas* Advice Letter, No. A-96-248.)

However, finding that the nexus test is satisfied is not the end of the analysis. *A special rule can apply when a conflict of interest exists under the nexus test, but the governmental decision will have no financial effect at all on the public official’s outside employer.* In this regard, regulation 18705 states in relevant part:

“(c) Special Rules. Notwithstanding Title 2, California Code of Regulations, sections 18705.1 through 18705.5, inclusive, an official does not have to disqualify himself or herself from a governmental decision if:

(1) Although a conflict of interest would otherwise exist under Title 2, California Code of Regulations, sections 18705.1 through 18705.4, inclusive, and 18706, the decision will have no financial effect on the person or business entity who appears before the official, or on the real property.”

This is a fact-dependent decision that will require Mr. Armendariz to consider the circumstances surrounding a specific decision in order to determine whether the nexus test and the exception of regulation 18705(c) apply.

## **6. Is the Material Financial Effect Reasonably Foreseeable?**

An effect upon economic interests is considered reasonably foreseeable if there is a substantial likelihood that it will occur. (Reg. 18706, subd. (a).) A financial effect need not be certain to be considered reasonably foreseeable, but it must be more than a mere possibility. (*In re Thorner* (1975) 1 FPPC Ops. 198.)

## **7. & 8. Exceptions**

The seventh step of the Commission's standard conflict-of-interest analysis is the "public generally" exception. This exception applies when the financial effect of a decision upon a public official's economic interests is indistinguishable from the effect of the decision on a significant segment of the public generally. (§ 87103; reg. 18707, subd. (a).) Under this two-pronged exception, if a "significant segment" of the jurisdiction or the official's election district is affected by the governmental decision in "substantially the same manner" as it would affect the public official, the public official may participate in the decision.

The eighth step of the Commission's standard conflict-of-interest analysis is the "legally required participation" exception. This is an exception that typically applies when an agency is unable to assemble a quorum of its members without the participation of an official who has a conflict-of-interest.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca  
General Counsel

By: C. Scott Tocher  
Senior Commission Counsel,  
Legal Division

Enclosures  
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